United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

No. 74-2044

United States Court of Appeals

FOR THE SECOND CIRCUIT

LOCAL 1104, COMMUNICATION WORKERS OF AMERICA, AFL-CIO, and LOCAL 1101, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NEW YORK TELEPHONE COMPANY AND WELLINGTON G. RIGBY,

Intervenors.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether the Board properly found that Locals 1101 and 1104 violated Section 8(b)(2) and (1)(A) of the Act by demanding the discharge of employees under a union security clause to enforce payment of union

dues, while simultaneously denying such employees union membership because they exercised Section 7 rights.

2. Whether the Board properly found that Local 1101 violated Section 8(b)(1)(A) of the Act by denying membership to employees for crossing a picket line in support of an unlawful strike.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of Locals 1104 and 1101 to review and set aside an order (96a-97a)[1] of the National Labor Relations Board issued on June 6, 1974, and reported at 211 NLRB No. 18. The Board has filed a cross-application for enforcement of its order, and the successful charging parties below, New York Telephone Co. and Wellington G. Rigby, have intervened herein. This Court has jurisdiction under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, hereinafter "the Act"), the unfair labor practices having occurred in the state of New York.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that Locals 1101 and 1104 violated Section 8(b)(2) and (1)(A) by requesting the discharge pursuant to a union security clause of 29 employees who refused to pay dues after the Union denied them membership for crossing an illegal picket line and of employee Wellington Rigby who refused to pay dues after the Union denied him membership for engaging in protected activities on behalf of another union. The Board also found that Local 1101 violated Section 8(b)(1)(A)

[1] "___a" references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following refer to the supporting evidence.

by denying membership to the 29 employees. The evidence underlying these findings is summarized below.[2]

A. Background

The Communication Workers of America (herein "CWA") is the collective bargaining representative for employees in a number of separate bargaining units in the Bell System, including the New York Telephone Company (herein "Telco"). The petitioners are constituent locals of the CWA located in the New York City metropolitan area (72a).

In 1971, as in the past, CWA and the Bell System bargained nationally on a pattern basis, with Western Electric Company and Chesapeake & Potomac Telephone Company as the pattern makers. These negotiations resulted in a nationwide telephone strike from July 14, 1971, through July 21, 1971. Representatives of Local 1101 and other New York State locals started negotiations with Telco on July 6, 1971, for a new contract to succeed the current one, which expired July 28, 1971. Although the New York locals had failed to timely give the termination and strike notices required by Section 8(d) of the Act, they struck Telco on July 14, 1971, before the expiration of their contract. This strike was held to be illegal because of the failure to comply with Section 8(d) in *Communications Workers of America (New York Tel. Co.)*, 208 NLRB No. 32 (1974).[3] During the strike, a number of Telco employees reported for work. Some had never been members of the Union and others had resigned from the Union (74a).

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[2] The case was decided on a stipulated record and the facts are essentially undisputed (35a, 72a).

[3] It was stipulated that the transcript and exhibits in that case constitute part of the record in this case (72a, 84a; 64a).

The national negotiations resulted in an agreement on July 18, 1971, subject to ratification by employees on a unit basis. The CWA National Executive Board thereupon terminated the strike and directed all members to return to work on July 21 pending results of the ratification vote. The New York locals, however, including the Locals in this proceeding, opposed the settlement agreement and remained on strike.[4]

On August 19, 1971, Telco resumed negotiations with the CWA. On August 26, CWA formally authorized the strike of the New York locals which then was continuing in effect. A new contract between CWA and Telco was finally ratified on February 16, 1972, and the New York strike was terminated on February 18, 1972 (74a).

B. The Telco Case

Initial membership in the Union was voluntary under the CWA-Telco contract which expired July 28, 1971, as it contained only a maintenance of dues provision (74a). The agreement reached in February 1972[5] contained an "agency shop" provision for the first time. This clause provided (74a-75a; 32a-33a):

> 33.01 Each regular employee shall, as a condition of employment, pay or tender to the Union amounts equal to the periodic dues applicable to members for the period beginning 30 days after hire or 30 days after February 17, 1972, whichever occurs later, until the termination of this collective bargaining agreement, except that an employee may terminate this condition of employment by giving a written individual notice to the Company and the Union of such termination by certified or registered mail, return receipt requested, and postmarked between July 8, 1974 and July 17, 1974 both dates inclusive.

[4] Three upstate New York CWA locals returned to work in compliance with CWA National Board directive (74a).

[5] All dates hereafter are 1972 unless otherwise noted.

Pursuant to this contractual clause, 29 named Telco employees applied for membership in Local 1101 in July and executed checkoff cards authorizing Telco to deduct Union dues from their wages (75a-76a; 65a). On August 18, the membership applications of these employees were rejected solely because they had refused to participate in the illegal strike and had crossed Local 1101's picket lines (76a; 27a). Consequently, the employees made no further tenders to the Union (76a). Thereafter, on December 4, Local 1101 requested that the Company discharge each of the employees pursuant to the union security provision of the contract (76a; 27a).

C. The Rigby Case

Wellington G. Rigby has been a Telco employee since July 6, 1948. He became a member of Local 1104 in May 1969, and remained a member until July 7, 1971, when he resigned as permitted by the collective bargaining agreement then in effect. Rigby honored the Union's picket lines during the strike and did not work. He returned to work only after the strike ended (82a, 97a, n. 1).

In the spring of 1972, Rigby briefly engaged in organizing activities for the Teamsters. On July 20, 1972, after he had ceased his activities on behalf of the Teamsters, Rigby applied for membership in Local 1104 (82a; 54a). At the same time, he executed a checkoff card authorizing the Company to deduct membership dues from his wages (82a; 51-53a). On September 2, Rigby reiterated his membership request in a letter to the Union and tendered dues requested by the Union by personal check (82a, n. 7; 6a-7a, 10a). On September 5, Local 1104 refused Rigby's tender and rejected Rigby's application for membership solely on the ground that he had previously engaged in organizational activities on behalf of a rival union (82a; 54a). After this denial of membership, he made no further tender of dues, and Local 1104 demanded that Telco

terminate Rigby's employment pursuant to the union security clause (82a-83a; 12a).

II. THE BOARD'S CONCLUSION AND ORDER

On the foregoing facts, the Board found that Local 1101's request that Telco discharge twenty-nine employees who refused to pay amounts equal to dues after the Union denied them membership for crossing an illegal picket line was violative of Section 8(b)(2) and (1)(A) and that the denial of membership was also a violation of Section 8(b)(1)(A). The Board further found that Local 1104's request that Telco discharge Wellington Rigby who refused to pay amounts equal to dues after the Union denied him membership was also violative of Section 8(b)(2) and (1)(A) (70a-87a).

The Board's order requires Locals 1101 and 1104 to cease and desist from the unfair labor practices found and from, in any like or related manner, restraining or coercing employees in the exercise of Section 7 rights. Affirmatively, the Board's order requires Local 1101 to offer union membership to the 29 employees unlawfully denied membership upon tender of periodic dues and initiation fees, and requires Local 1101 and Local 1104 to post appropriate notices (88a-97a).

ARGUMENT

I. WHETHER THE BOARD PROPERLY FOUND THAT LOCAL 1104 AND LOCAL 1101 VIOLATED SECTION 8(b)(2) AND (1)(A) OF THE ACT BY ATTEMPTING TO CAUSE THE DISCHARGE, UNDER A UNION SECURITY CLAUSE, OF EMPLOYEES WHO HAD BEEN DENIED MEMBERSHIP IN THE LOCALS FOR REASONS OTHER THAN THEIR FAILURE TO TENDER DUES AND INITIATION FEES

As shown in the Counterstatement, 29 named employees applied for membership in Local 1101 and executed dues checkoff cards authorizing

Telco to withhold and remit dues to Local 1101. Employee Wellington Rigby also applied for membership in Local 1104 and executed a check-off card. The Locals refused to admit the employees to membership and apparently refused to accept the checkoffs. Local 1101 concededly denied membership to the 29 employees solely because they had crossed the Local's picket line at a time when they were not union members (76a; 27a); Local 1104 concededly denied membership to Rigby solely because, while a nonmember he had undertaken a brief organizing effort on behalf of another union (82a; 54a). It is beyond dispute that such activity by employees is protected under Section 7 of the Act.[6] There was no further tender of dues and the Unions thereafter sought to have the employees discharged under the otherwise lawful union security clause. In these circumstances, we submit that the Board properly found that the Unions violated the Act by "invoking a lawful union-security clause to enforce payment of dues where employees have been denied membership for exercising a right . . . guaranteed by Section 7 of the Act" (80a, 83a).

It is well established that "the policy of the Act is to insulate employees' jobs from their organizational rights. Thus, Section 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to

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[6] Refraining from strike participation: *N.L.R.B. v. Granite State Joint Board*, 409 U.S. 213, 216-218 (1972); *Booster Lodge, No. 405, IAM v. N.L.R.B.*, 412 U.S. 84, 87-88 (1973). The clause guaranteeing "the right to refrain from any or all of such [union] activities" was added to Section 7 to "make the prohibition contained in Section 8(b)(1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line." 93 Cong. Rec. 6859, II Legislative History of the Labor Management Relations Act, 1947, 1623.

Organizing for a new union or attempting to replace union leadership: *Goshen Litho, Inc.*, 196 NLRB 977, 980-983, enf'd. in material part, 476 F.2d 662 (C.A. 2, 1973); *N.L.R.B. v. Local 138, Int'l Union of Operating Engineers*, 293 F.2d 187 (C.A. 9, 1961); *N.L.R.B. v. I.A.M., Local 504*, 203 F.2d 173 (C.A. 9, 1953).

join unions, be good, bad or indifferent members, or abstain from joining any union without imperiling their livelihood" *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 40 (1954).[7] The only exception is where there is a valid union security clause agreed to by the parties to a collective bargaining agreement. However, that clause can be used only to enforce an obligation to pay dues and fees and not other union obligations.[8]

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[7] Section 8(b) provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents . . .
>
> (1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided*, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . .;
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some grounds other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Section 8(a)(3) broadly prohibits employee discrimination based on union membership or lack of membership. However, the first proviso to Section 8(a)(3) provides a limited exception, permitting a union to enter into an agreement with an employer requiring "as a condition of employment membership [in the union] on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later." The scope of such a "union security" agreement is carefully circumscribed by the second proviso to Section 8(a)(3), which provides that

> . . . no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

[8] See, *e.g.*, *National Maritime Union v. N.L.R.B.*, 423 F.2d 625 (C.A. 2, 1970) (union refused to refer individual to work because of his opposition to incumbent

(continued)

It may not be used to enforce a dues obligation when membership is not available on the same terms as are available to others. Thus, Section 8(b)(2) by its literal terms (n. 7, *supra*) prohibits job related sanctions where an employee has been denied membership on grounds other than the failure to pay dues. And that Section also incorporates Section 8(a)(3) whose provisos prohibit discrimination against employees where "membership was not available . . . on the same terms and conditions generally applicable to other members . . ." and where it was denied for reasons other than the payment of dues. See, *Union Starch & Refining Co. v. N.L.R.B.*, 186 F.2d 1008 (C.A. 7, 1951), enf'd. 87 NLRB 779, cert. denied, 342 U.S. 815.

The instant case does not fall within [redacted] the statutory exceptions to prohibited discrimination based on a union security clause. The Unions denied membership to the employees concededly for engaging in activity protected by Section 7 of the Act, and thus membership was not available to them on the same conditions as it was to other employees and it was denied for reasons other than the non-payment of dues. The Unions then sought to have the employees discharged for not paying dues, which, in the circumstances, was really an attempt to cause their discharge because of their protected activity. Such conduct is similar to that found unlawful by this Court in *N.L.R.B. v. Bell Aircraft Corp.*, 206 F.2d 235, 238 (C.A.

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[8] (continued) union administration); *N.L.R.B. v. Local 282, Teamsters*, 412 F.2d 334 (C.A. 2, 1969), cert. denied, 396 U.S. 1038 (union stripped member of seniority he had retained while a supervisor because of his anti-union conduct in that capacity); *N.L.R.B. v. Local 490, Hod Carriers*, 300 F.2d 328 (C.A. 8, 1962) (union refused to certify member for work for violating internal union rule by working for an "unfair employer"); *N.L.R.B. v. Eclipse Lumber Co.*, 199 F.2d 684 (C.A. 9, 1952), enforcing 95 NLRB 464, 467. (Court upheld the Board's finding illegal a discharge effected pursuant to a union security clause because the discharge was actually based on an unpaid fine for a refusal to picket rather than on unpaid dues); *N.L.R.B. v. IAM, Local 504*, 203 F.2d 173, 176 (C.A. 9, 1953) (discharge pursuant to union security clause illegal where formal tender of dues would have been futile as union fined and expelled employee for organizing rival union.)

2, 1953). The Court noted that the proviso to Section 8(a)(3) permits an exception for discrimination against an employee but only where based on the failure of the employee to tender dues. In language equally applicable to this case, this Court in *Bell* stated: "the discrimination[9] . . . was not within the exception. On the contrary, it was only because [the employee] exercised a right protected by the Act that charges were filed against him in the union, which here is equivalent to denying him membership in good standing; and by causing the employer, for that reason, to deny him a promotion he otherwise would have had, the union violated Section 8(b)(2)." (206 F.2d at 238).

In similar circumstances, the Board has found violative of the Act a union's threatened or actual use of a union security clause to punish employees after having substantially curtailed membership rights. In *Local 4186, United Steelworkers (McGraw-Edison Co.)*, 181 NLRB 992 (1970), the union substantially curtailed the rights of a union member for filing a decertification petition. The member thereupon refused to pay dues and the union threatened to seek his discharge under the applicable union security clause. The Board found a violation because the job-related sanction was ultimately based on union dissatisfaction with the employee's seeking access to the Board. As the Board stated (*Id.*):

> . . . [the Union's] insistence upon [the employee's] continued payment of dues during periods when his rights as a member were significantly reduced constituted a continuing form of coercion tending to operate as serious restraint upon access to Board processes. The Union's insistence upon [the employee's] payment of dues, on pain of discharge, cannot be considered as disassociated from the suspension of membership rights resulting from his decertification activity.

[9] The discrimination in *Bell* consisted of internal union charges, predicated on the employee's crossing of a picket line which prevented the employee's promotion.

See also, *Communication Workers of America, Local 9509 (Pacific Telephone & Telegraph Co.)*, 193 NLRB 83 (1971). In both cases, the union's conduct was ostensibly taken as a result of the non-payment of dues required by the applicable union security provision. However, in each, it was clear that the union's impairment of membership rights and consequent job-related sanctions were occasioned by the decertification activity and the union was simply using this device to collect dues while denying full membership.

Similarly, here, the Unions denied membership, not for failure to tender dues, but because the applicants had engaged in protected activity. Having thus been denied membership by the Unions, it was not incumbent upon the employees to pay dues without the benefit of the same type of membership which was available to other employees but denied to them. In these circumstances, the Unions' attempted imposition of a job-related sanction undoubtedly had the foreseeable effect of encouraging adherence to the Unions' views and discouraging protected activity. See *Radio Officers, supra*, 347 U.S. at 28-33, 46, 52.[10]

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[10] Contrary to the Unions' contention (Br. 11-12), *Union Starch* is not inconsistent with the Board's decision in the instant case. Although the court in *Union Starch* approved the Board's determination that the union there could not cause discharge for reasons other than the failure to tender dues, this was predicated on the employees' right to union membership on "non-discriminatory terms and conditions" (186 F.2d at 1012) – a right plainly not available here. Moreover, as the Board stated in *Union Starch*:

> If the union imposes any other qualifications and conditions for membership with which [an employee] is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job. Throughout the amendment to the Act, Congress evinced a strong concern for protecting the individual employee in a right to refrain from union activity and to keep his job even in a union shop. Congress carefully limited the sphere of permissible union security, and even in that limited sphere accorded the union no power to effect the discharge of nonmembers except to protect itself against "free rides." *Union Starch & Refining Co., supra*, 87 NLRB at 784-785.

The Unions contend that the fees they sought to collect from Rigby and his fellow employees were solely to provide collective bargaining services to nonmembers and that failure to pay such fees invites discharge (Br. 5, 7, 9, 18, 19, 24). This is clearly without merit. The record shows no difference in the amounts assessed full members and those sought from the employees denied membership. See, *Local 1625, Retail Clerks Int'l Assn. v. Schermerhorn*, 373 U.S. 746, 753-754 (1963). Moreover, contrary to the Unions' contention, the employees here were not "free riders." The employees applied for union membership and executed dues checkoff authorizations. Membership was denied them by the Union because they had engaged in activity protected by Section 7 of the Act. Thus, the evidence clearly indicates that these employees wanted to pay for their ride and "Section 8(b)(2) and the Section 8(a)(3) provisos were designed to protect both the union from free riders and employees who are willing to pay for their ride." *Local 4186, (McGraw Edison), supra*, 181 NLRB at 995.

The Unions' heavy reliance (Br. 12-15) upon the *General Motors* case[11] is misplaced. The issue there was the validity of an "agency shop" type of union security agreement — that is, a provision which required all employees after 30 days to pay the union's regular initiation fee and monthly dues, but left to the employees the option whether to join the union or not. The Court ruled that such an arrangement was permitted by Section 8(a)(3) of the Act and that an employee who refused to make the required payments could lawfully be terminated upon the union's request. At the same time, the Court affirmed the rule that an employee who is willing to make the required payments need not apply for or accept union membership. The Unions seek to equate the employees here to "financial core" members who must contribute to the Union's support regardless of whether they choose to exercise membership rights.

[11] *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734 (1963).

The critical distinction, we submit, is that the employees' membership rights have been denied *by the Union* and thus the employees no longer enjoy the option to exercise them or not. Indeed, the *General Motors* decision stresses the fact that the agency shop arrangement under consideration "removes that choice [i.e., between full membership and 'financial core' status] from the union and places the option of membership in the employee . . ." *Id.* at 744. Further, the Court expressly did not deal with the question presented herein, stating that "the significance of desired, but unavailable, union membership, or the benefits of membership, in terms of permissible §8(a)(3) security contracts, we leave for another case." *Id.* at 745, n. 12.

To the extent that the Unions contend (Br. 22-25) that they are permitted to utilize the union security clause to force the collection of dues after denying membership, under the proviso to Section 8(b)(1)(A),[12] they are mistaken. The cases cited by the Unions to support this position, *e.g., N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *Price v. N.L.R.B.*, 373 F.2d 443 (C.A. 9, 1967), cert. denied, 392 U.S. 904 (1968), are clearly inapposite. Unlike the conduct in those cases, the Unions here imposed job-related, rather than internal, union sanctions. See, *McGraw Edison, supra*, 181 NLRB at 994. Thus, in *Allis-Chalmers* the Court stated that Section 8(b)(1)(A) "barr[ed] enforcement of a union's internal regulations to affect a member's employment status" 388 U.S. at 195. Here, the employees were denied membership for engaging in protected activity and the Unions sought to enlist the aid of the employer to collect union dues by the most compelling and coercive device available — the threat of discharge. Such conduct breaches the insulation between employees' jobs and their organizational rights (*Radio Officers, supra*, 347

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[12] . . . [T]his paragraph shall not impair the rights of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . .

U.S. at 40), since the Unions sought job-related sanctions in clear violation of the express language of Section 8(a)(3) and (b)(2), which prevent discharges pursuant to union security clauses where membership has been denied on grounds other than nonpayment of dues and fees.[13]

II. THE BOARD PROPERLY FOUND THAT LOCAL 1101 VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY DENYING MEMBERSHIP TO EMPLOYEES WHO CROSS A PICKET LINE IN SUPPORT OF A STRIKE WHICH IS UNLAWFUL UNDER SECTION 8(d) OF THE ACT

Section 8(b)(1)(A) makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of Section 7 rights. That section gives employees the right, *inter alia*, to engage in concerted activities for collective bargaining or other mutual aid, and also the right to refrain from any and all such activities. The proviso to Section 8(b)(1)(A) provides that the section shall not impair a union's right to prescribe its own rules with respect to the acquisition or retention of membership. However, it is settled that the proviso is not absolute, but merely "leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws and is reasonably enforced against union members. . . ." *Scofield v. N.L.R.B.*, 394 U.S. 423, 430 (1969). See also, *N.L.R.B. v. Boeing Co.*, 412 U.S. 67, 71-74 (1973).

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[13] Contrary to the Unions' suggestion (Br. 16, n. 9), there is no inconsistency in the failure to find that denial of membership to Rigby separately violated Section 8(b)(1)(A) and the finding that a job-related sanction to collect dues after having denied him membership is unlawful. The General Counsel, in refusing to issue a complaint on the former ground (see 13a-14a), recognized that so long as there is no job-related sanction, a union may deny membership under circumstances which reflect a legitimate union interest. Thus, the Union could properly deny membership to Rigby for engaging in dual unionism; and the Board did not consider his denial of membership when it found unlawful, as not reflecting a legitimate union interest, the denial of membership to the other Telco employees who crossed an unlawful picket line. See, *infra*, pp. 14-19.

Thus, it has been held a violation of Section 8(b)(1)(A) for a union to expel a member, pursuant to union rule, for filing an unfair labor practice charge with the Board without first exhausting his intra-union remedies. *N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers of America*, 391 U.S. 418, 424, 425 (1968) ("§8(b)(1)(A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned. But where a union rule penalizes a member [by expulsion] for filing an unfair labor practice charge with the Board, other considerations of public policy come into play. . . ." The proviso is "not so broad as to give the union power to penalize a member who invokes the protection of the Act for a matter that is in the public domain and beyond the internal affairs of the union"). The employee was required to be admitted to union membership in order to effectuate the policies of the Act, 391 U.S. at 428, enforcing the Board's Order, 159 NLRB 1065-1066.

This principle was also applied by this Court in *N.L.R.B. v. Communication Workers of America, AFL-CIO, Local 1170, (Rochester Telephone)*, 474 F.2d 778 (1972). In *Rochester Telephone*, the union enacted a rule placing an embargo on unit members' acceptance of temporary supervisory assignments contrary to, and in mid-term of, the collective bargaining agreement between the parties. The union "brought up on charges" employees who accepted supervisory assignments after institution of the union ban. The Court upheld the Board finding that the union's embargo violated Sections 8(d) and 8(b)(3) and that the enforcement of the embargo violated Section 8(b)(1)(A) since it "was invasive of an overriding policy of the labor laws." *Id.* at 782.

The situation here involves the same infringement of statutory policy. As shown in the Counterstatement, and conceded by Local 1101 (Br. p. 5), the strike conducted against Telco was unlawful as the Union had not given the contract termination and strike notices required by Section

8(d) of the Act. In *Rochester Telephone*, internal sanctions were applied whereas, here, membership was denied. This is not a relevant difference since in both cases the sanctions reflect no legitimate union interest and invade important statutory policies. It is beyond cavil that Section 8(d) is of critical importance to the scheme of the Act since it "seeks to bring about the termination and modification of collective bargaining agreements without interrupting the flow of commerce or the production of goods. . . ." *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 284 (1956). It does so by providing an insulated period of 60 days at an appropriate time — prior to the termination date of the contract — where the parties may bargain free from "the economic pressures of a strike or lockout." *Id.* at 286. Senator Ball, a manager of the 1947 amendments, noted the importance of the notice provisions of Section 8(d) in collective bargaining:

> . . . [W]here a contract between a union and an employer is in existence, fulfilling the obligation on both sides to [bargain] collectively means giving at least 60 days' notice of the termination of the contract, or of the desire for any change in it, [this] is another provision aimed primarily at protecting the public, as well as the employee, who have been the victims of "quickie" strikes. . . . [all parties] should follow the sound, fair and sane procedure which a majority of the good ones now follow. 93 Cong. Rec. 5014, II Leg. Hist. of the Labor Management Relations Act, 1947, 1496. See also, II Leg. Hist. 1947, 1015.

Clearly, in these circumstances, approval of the Unions' denial of membership to those who refused to participate in the unlawful strike would impair the explicit statutory policy of preserving the stability of collective bargaining by requiring sufficient notice of contract terminations and of preventing "quickie" strikes. See also, *Cannery Warehousemen Food Processors, Local No. 788*, 190 NLRB 24, 26-27 (1971) (union unlawfully fined employee for testifying adversely to union in arbitration

hearing thus impairing integrity of contractual arbitration clause in violation of Section 8(d) and (b)(3); *Cannery Workers Union (Van Camp Co.)*, 159 NLRB 843, 846-847 (1966), enf'd, 396 F.2d 955 (C.A. 9, 1968), cert. denied, 393 U.S. 1025 (union expulsion of employee after he filed unfair labor practice charges with the Board held unlawful); *Local 12419, District 50, United Mine Workers (National Grinding Wheel)*, 176 NLRB 628, 629-632 (1969) (union's fine of employees crossing picket line in violation of contractual no-strike clause held unlawful); *Glazier's Local 1162, Brotherhood of Printers*, 177 NLRB 393, 397-399 (1969) (union's fine of employee for refusing to join in strike violating no-strike clause held unlawful); *Carpenters and Joiners, Local 1620*, 208 NLRB No. 27, 85 LRRM 1271 (1974), enf. ____ F.2d ____, (C.A. 10, No. 74-1101, January 13, 1975) (union's fine of employees for crossing union's secondary picket line violating Section 8(b)(4)(B) held unlawful); *Int'l Molders & Allied Workers, Local 125*, 178 NLRB 208 (1969), enf'd 422 F.2d 92, 94 (C.A. 7, 1971) (union's fine for employee circulation of decertification petition held unlawful).[14]

The cases cited by the Union (Br. 22-23) to support its denial of membership under the proviso are distinguishable on their facts. In none of those cases was a union permitted to penalize employees for refusing, as here, to support an unlawful strike or otherwise to engage in unlawful activity. In a number of those cases, the unions were found

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[14] *N.L.R.B. v. Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967) cited by the Union (Br. 18-19, 21) is clearly distinguishable from this case and the above cases. That decision held that union fines against members for crossing an authorized and lawful picket line were permissible as effectuating legitimate internal union policy that did not impair a major policy of the labor laws. In contrast, here, the employees were penalized for crossing an unlawful picket line. Moreover, in *N.L.R.B. v. Granite State Joint Board*, 409 U.S. 213 (1972), the Supreme Court rejected union solidarity arguments similar to those advanced here (Br. 19-25), stating: "[employees'] §7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime." *Id.* at 218.

to have had a legitimate interest in suspending from membership or debarring from union office employees who had filed decertification petitions,[15] organized on behalf of rival unions,[16] sought deauthorization of the union security clause,[17] or refused to engage in a lawful strike after having resigned from the Union.[18] The Board and the courts permit such limited defensive action in support of a legitimate union interest so that a union may protect its existence and not have dissidents privy to its plans and operations. *Tawas Tube Products, Inc.*, 151 NLRB 46 (1965); *Int'l Molders & Allied Workers, Local 125 (Blackhawk Tanning Co.)*, 178 NLRB 208 (1969), enf'd, 442 F.2d 92 (C.A. 7, 1971).[19]

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[15] *Price v. N.L.R.B.*, 373 F.2d 443 (C.A. 9, 1967), cert. denied, 392 U.S. 904; *Int'l Molders & Allied Workers, Local 125, (Blackhawk Tanning Co., Inc.)*, 178 NLRB 208 (1969), enf'd, 442 F.2d 92 (C.A. 7, 1971); *Tawas Tube Products, Inc.*, 151 NLRB 46 (1965); *United Steelworkers of America, Local 4028 (Pittsburgh Des Moines Steel Co.)*, 154 NLRB 692 (1965); *United Lodge No. 66, IAM (Smith-Lee Co.)*, 182 NLRB 849 (1970).

[16] *Tri-Rivers Marine Engineers Union*, 189 NLRB 838 (1971); *Printing Specialties, Union, 481 (Westvaco Corp.)*, 183 NLRB 1271 (1970).

[17] *Machinist Lodge 113 (American Hospital Supply Corp.)*, 207 NLRB No. 127, 84 LRRM 1601 (1973).

[18] *N.L.R.B. v. District Lodge No. 99*, 489 F.2d 769 (C.A. 1, 1974); *Local 1255, IAM v. N.L.R.B.*, 456 F.2d 1214 (C.A. 5, 1972).

[19] However, in a number of the cited cases, the unions went further and fined the employees, leading the courts and the Board to conclude in such cases that the union had exceeded the bounds of its legitimate interest by engaging in punitive rather than defensive activity thereby violating Section 8(b)(1)(A). *Int'l Molders & Allied Workers, supra*, 178 NLRB at 208-209, enf'd, 442 F.2d at 94-95; *Tri-Rivers Marine Engineers Unions, supra*, 189 NLRB at 839 (union fine and threat of expulsion if the fine was not paid was not defensive "but is to discourage other union members from resorting to [organizational activity] and hence is punitive"); *Tool & Die Makers, Lodge 113, IAM, supra*, 207 NLRB No. 127, slip opin. pp. 5-9, 84 LRRM at 1603-1604; *United Lodge No. 66, supra*, 182 NLRB at 850; *Printing Specialties, Union 481*, 183 NLRB at 1274.

Here, on the other hand, the Union's conduct went beyond legitimate union interests penalizing employees for not honoring an unlawful picket line and invading an area of public policy which the Congress explicitly sought to protect. Moreover, had these employees engaged in the unlawful strike they would have lost their status as employees under the Act pursuant to the terms of Section 8(d).[20] The employees were thus confronted with the dilemma of either participating in the illegal strike with possible loss of employee status, or crossing the picket line and being barred from the Union which nonetheless sought payment of membership fees on pain of discharge. Plainly, the Section 8(b)(1)(A) proviso is not applicable where, as here, the union is not vindicating a legitimate interest and is impairing major policies of the labor laws.

The Unions cite *Local Lodge No. 1424, Int'l. Ass'n. of Machinists v. N.L.R.B. (Bryan Mfg. Co.)*, 362 U.S. 411 (1960) and contend (Br. 28) that since the strike occurred outside the Section 10(b) period,[21] the Board improperly considered the fact that the strike was unlawful when assessing the denial of membership issue. This contention is clearly without merit. The Board properly found, and

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[20] Section 8(d) provides in relevant part: ". . . any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of section 8, 9, and 10 of this Act . . . ."

The Unions assert that the employees had no knowledge of the illegality of the strike and contend that the employees were therefore disloyal and subject to union penalties (Br. 26). This contention is without merit. First, there is no record evidence as to the employees' motivation in crossing the picket line. Secondly, the Unions' conduct, if permitted, would enhance the success of an illegal strike notwithstanding the motivation of the employees in crossing the line. Finally, in removing employee status from those who participate in §8(d) strikes – a more serious punishment than denial of union membership – Congress made no distinction based on the employee's good faith belief that the strike was lawful.

[21] Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of [an unfair labor practice] charge with the Board. . . ."

the Unions admitted (83a, n. 8; 27a), that the employees were denied membership on or about August 18, 1972, clearly within six months of the charge which was filed on February 2, 1973 (71a; 18a, 20a), and it is also conceded that the strike was invalid (Br. 5). The finding that the strike violated Section 8(d) was made in *Local 1101, CWA, AFL-CIO (New York Telephone Co.)*, 208 NLRB No. 32 (1974), which case was made part of the record herein. Where, as here, the unlawful conduct occurs within the limitations period and the Board refers to an earlier Board finding after full litigation as background, its decision cannot be said to be based on events outside the limitations periods. See, *N.L.R.B. v. Colonial Press Inc.*, ____ LRRM ____ (C.A. 8, No. 74-1304 decided January 17, 1975) slip. op., pp. 6-7; *N.L.R.B. v. American Aggregate Co.*, 305 F.2d 559, 562-563 (C.A. 5, 1962). See also, *Maphis Chapman Corp. v. N.L.R.B.*, 368 F.2d 298, 303 (C.A. 4, 1966).

The Supreme Court in *Bryan* did not intend to preclude the Board from relying on such pre-limitations events as background. This situation, as contrasted with one where the activity alleged to be an unfair labor practice is outside the 10(b) period, was explained and distinguished by the Court in *Bryan* (362 U.S. at 417):

> The first is one where occurrences within the six-month limitations period in and of themselves constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitation period; and for that purpose §10(b) ordinarily does not bar such evidentiary use of anterior events [footnote omitted]. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply bare

> a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful.

The instant case presents the first kind of situation contemplated in *Bryan*. For here, the denial of membership was clearly within the limitation period and the Board properly considered the illegality of the strike as relevant background in assessing the significance of active conduct — the denial of membership, which was admittedly based on the refusal to participate in the strike and within six months of the charge. As the District of Columbia Circuit stated:

> When within the six-month period there has been active conduct, as contrasted with mere passive inaction following an old offense, it is open to the Board to refer to previous acts "to shed light on the true character of matters occurring within the limitations period. [*Bryan*, *supra.*] 362 U.S. at 416. . . .

Int'l Union, United Automobile Workers (Aero Corp.) v. N.L.R.B., 363 F.2d 702, 706 (C.A.D.C., 1966), cert. denied, 385 U.S. 973 (1966). See also, *New York Dist. Council No. 9, Brotherhood of Painters v. N.L.R.B.*, 453 F.2d 783, 786 (C.A. 2, 1971), cert. denied, 405 U.S. 988; 408 U.S. 930. Any other interpretation of Section 10(b) would put employees in the untenable position of being forced to participate in unlawful strikes, secondary boycotts or other activities as ordered by a union, raising the possibility of discharge by their employer, or facing union discipline once the event was six months or more past. As the seventh Circuit observed in a case where the evidence of the discriminatory nature of a discharge was from outside the Section 10(b) period, "It does not seem reasonable to argue that the statutory limitation period begins to run before the violation occurs." *N.L.R.B. v. Plumbers & Pipe Fitters Local 214*, 298 F.2d 427, 428 (C.A. 7, 1962). See also, *N.L.R.B. v. Colonial Press*, *supra.*

CONCLUSION

For all the foregoing reasons, it is respectfully requested that the Court enter a judgment denying the Locals' petition for review and enforcing the Board's order in full.

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January, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LOCAL 1104, COMMUNICATION WORKERS OF AMERICA, AFL-CIO, and LOCAL 1101, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,	)	
Petitioners,	)	
v.	)	
	)	No. 74-2044
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent,	)	
and	)	
NEW YORK TELEPHONE COMPANY AND WELLINGTON G. RIGBY,	)	
Intervenors.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 27th day of January, 1975

/s/ Elliott Moore
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Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD